

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CHRISTOPHER CANTON,
Plaintiff

vs.

UNITED PARCEL SERVICE
COMPANY,
Defendant.

NO. CV-06-0097-EFS

**ORDER GRANTING DEFENDANT UNITED
PARCEL SERVICE CO.'S MOTION FOR
SUMMARY JUDGMENT AND CLOSING FILE**

Before the Court, without oral argument, is Defendant United Parcel Service ("UPS") Company's Motion for Summary Judgment (Ct. Rec. 52). UPS contends Plaintiff Christopher Canton failed to present sufficient facts to establish that he either suffered workplace harassment based on his race or retaliation for reporting alleged workplace behavior constituting racial harassment. Mr. Canton largely agrees with UPS's statement of the facts; yet, contends that when the facts are viewed in his favor genuine issues of material fact exist for trial. The Court having reviewed the record and relevant authority is fully informed. For the reasons stated herein, UPS's motion is granted.

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I. Factual Statement¹

Mr. Canton started working for UPS in May 1988 as a part-time employee, (Ct. Rec. 1); and on March 27, 1995, he became a full-time package car driver. (Ct. Rec. 57: Bond. Decl. ¶ 1.) He continues to work as a package car driver today based out of UPS's Spokane Center. (Ct. Rec. 1). Throughout his employment, Mr. Canton has been represented by the International Brotherhood of Teamsters. (Ct. Rec. 57: Bond Decl. ¶ 3.)

Although UPS has a Professional Conduct and Anti-Harassment Policy that each employee is required to review and sign (Ct. Rec. 58: Decl. Cramer ¶ 7 & Ex. D), Mr. Canton contends this policy is not enforced. This policy states that UPS "prohibits unprofessional, and discourteous actions, even if those actions do not constitute unlawful harassment." *Id.* at Ex. D. The policy directs any:

employee who witnesses objectionable conduct or believes that he or she is subject to or may be subjected to objectionable conduct [to] report it immediately to a supervisor or manager, a Human Resources representative, the Human Resources manager, the Employee Relations manager, or the UPS Help Line at 1-800-220-4126.

Id. "In response to such reports, UPS . . . conduct[s] a prompt and thorough investigation" and takes "immediate and appropriate corrective action whenever it determines that harassment has occurred." *Id.* It is Mr. Canton's position that employees are intimidated from reporting

¹In ruling on a motion for summary judgment, the Court considered the facts and all reasonable inferences therefrom as contained in the submitted affidavits, declarations, exhibits, and depositions, in the light most favorable to Plaintiff, the party opposing the motion. See *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1972) (*per curiam*). The following factual recitation was created utilizing this standard.

1 objectionable conduct; however, he agrees that a reported situation will
2 be investigated immediately.

3 Mr. Canton's harassment claims are based in part on statements made
4 to him by coworkers and a supervisor. The first incident occurred in
5 December 2004 between Mr. Canton and fellow driver Kevin Harmon when Mr.
6 Harmon called him a "boy." (Ct. Rec. 57 ¶ 5.) Mr. Canton complained to
7 his manager, Paul Bond, who investigated the incident and counseled Mr.
8 Harmon regarding UPS's expectations for appropriate workplace behavior.
9 *Id.*

10 On January 6, 2005, Mr. Canton claims that his co-worker Justin
11 Mulvey called him "boy." (Ct. Rec. 56-2: Canton Dep. 28:16-29:24.) Mr.
12 Canton reported this incident to his supervisor, Clive Luiten, who told
13 Mr. Canton that if "you have a problem with someone calling you 'boy,'
14 you need to report it to Mr. Paul Bond." *Id.* Mr. Bond investigated the
15 incident and issued Mr. Mulvey a written warning for unprofessional
16 behavior on January 11, 2005. *Id.* at 33:23-34:1; Ct. Rec. 57 at Ex. A.

17 On March 4, 2005, Mr. Canton's supervisor, Richard "Monte" Hall,
18 rode along with Mr. Canton on his route. (Ct. Rec. 56-2: Canton Dep. at
19 109:4-109:25.) Mr. Canton received and accepted positive feedback from
20 Mr. Hall, but disagreed with some of Mr. Hall's suggestions for
21 improvement. *Id.* at 49:15-50:4. During the ride, a dispute arose
22 between Mr. Canton and Mr. Hall. Mr. Hall recounted the events of the
23 day in a written statement (Ct. Rec. 58 Ex. A); which Plaintiff contends
24 is 75% true and 25% false, largely disputing Mr. Hall's recitation of
25 what occurred at the Fairchild Air Force Base delivery, including
26 whether Mr. Hall called Mr. Canton a "nigger." (Ct. Rec. 56-2: Canton
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1 Dep. at 109:4-109:25; Ct. Rec. 69 ¶ 20.) Mr. Canton reported the
2 incident to either his manager, Paul Bond, or UPS's Employee Relations
3 Manager, Alton Edwards, on March 4, 2005. (Ct. Rec. 56-2: Canton Dep.
4 63:17-25.) Mr. Edwards directed Stan Cramer, UPS's Human Resources
5 Representative in Spokane, to investigate the incident. (Ct. Rec. 58:
6 Cramer Decl. ¶ 2 & Ex. B.) On March 7, 2005, Mr. Cramer interviewed two
7 soldiers, who were in the Fairchild Air Force Base office when the
8 exchange between Mr. Canton and Mr. Hall occurred. *Id.* ¶ 4 & Ex. B.
9 UPS determined Mr. Canton's version of the events was not substantiated.
10 *Id.* ¶ 5.

11 On March 15, 2005, Mr. Bond and Mr. Cramer met with Mr. Canton in
12 Mr. Bond's office to discuss the incident between Mr. Canton and Mr.
13 Hall. (Ct. Rec. 56-2: Canton Dep. at 64:13-23; Ct. Rec. 58: Cramer
14 Decl. ¶ 6 & Ex. C.) Mr. Bond's office is a cramped, windowless space
15 with a desk and three chairs. (Ct. Rec. 56-2: Canton Dep. at 67:22-
16 68:24.) During the conversation, Mr. Bond was seated behind his desk,
17 Mr. Cramer was seated near the corner of Mr. Bond's desk, and Mr. Canton
18 was seated in a chair with its back against the door. *Id.* Mr. Hall
19 entered the office during the meeting and struck Mr. Canton's chair with
20 the door when he pushed the door open. *Id.* at 68:24-69:25; 70:12-21.
21 Mr. Bond informed Mr. Hall that they were having a closed-door meeting.
22 Mr. Hall stated he was looking for a clipboard; Mr. Cramer provided Mr.
23 Hall with a clipboard. *Id.* at 76:9-77:2. Mr. Hall left without further
24 incident. *Id.* at 71:14-71:23. Mr. Hall did not touch Mr. Canton during
25 this incident; however, Mr. Canton believes, if Mr. Cramer had not been
26 in the office, Mr. Hall would have physically attacked Mr. Canton. *Id.*
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1 Mr. Bond advised Mr. Canton he would talk to Mr. Hall about the
2 incident. (Ct. Rec. 58: Cramer Decl. Ex. C.) Subsequently, Mr. Bond
3 counseled Mr. Hall that in the future he should knock before entering
4 Mr. Bond's office when the door was closed and that he should have
5 refrained from coming into Mr. Bond's office despite needing a
6 clipboard. (Ct. Rec. 57: Bond Decl. ¶ 7 & Ex. B.) Mr. Bond documented
7 his counseling session with Mr. Hall in a memorandum that was placed in
8 Mr. Hall's personnel file. *Id.*

9 UPS employs loaders whose job is to load three to four of UPS's
10 package cars each day at its Spokane facility before the UPS drivers
11 arrive for work. *Id.* ¶ 2. Loading points for UPS's package cars are
12 frequently adjusted to more evenly distribute the work among its
13 loaders. When making decisions about where to locate package cars for
14 loading, UPS considers factors such as the size of the car and ease with
15 which the loading can be shifted to another location. *Id.* ¶ 9. In
16 contrast to UPS's loaders, UPS drivers typically spend only 15-20
17 minutes of their day at the UPS facility before they head out to make
18 deliveries. *Id.* ¶ 10.

19 The loading location for Mr. Canton's package car, which serves
20 only one destination zip code and is the largest model package car that
21 UPS has in Spokane, has been moved on a number of occasions. *Id.* ¶¶ 14
22 & 15. For instance, in December 2004, Mr. Canton's package car was
23 moved to the satellite area for loading and was moved back to the main
24 building shortly after the Christmas holiday. *Id.* ¶ 15. In April 2005,
25 after Mr. Canton filed a complaint with the Human Rights Commission, his
26 package car was moved to the satellite area for loading; it was moved
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1 back to the main building in June 2005. *Id.* This relocation in April
2 2005 also included UPS moving twelve other package cars to the satellite
3 area; however, Mr. Canton's package car was the only package car from
4 the South Center building moved to the satellite area. *Id.*; Ct. Rec. 69
5 ¶¶ 43-52. Later, in September 2005, Mr. Canton's package car was moved
6 to the satellite area for loading and was moved back to the main
7 building in January 2006. (Ct. Rec. 57: Bond Decl. ¶ 15.) Then, in
8 March 2006, his package car was again moved to the satellite area, where
9 it currently remains. (Ct. Rec. 56-2: Canton Dep. at 83:4-7; Ct. Rec.
10 57: Bond Decl. ¶ 15.) Mr. Canton is happy in his current location, even
11 though his package car is stationed at the satellite area, along with
12 other South Center package cars. (Ct. Rec. 56-2: Canton Dep. at 294:6-
13 14.)

14 II. Summary Judgment Standard

15 Summary judgment will be granted if the "pleadings, depositions,
16 answers to interrogatories, and admissions on file, together with the
17 affidavits, if any, show that there is no genuine issue as to any
18 material fact and that the moving party is entitled to judgment as a
19 matter of law." FED. R. CIV. P. 56(c). When considering a motion for
20 summary judgment, a court may not weigh the evidence nor assess
21 credibility; instead, "the evidence of the non-movant is to be believed,
22 and all justifiable inferences are to be drawn in his favor." *Anderson*
23 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A genuine issue for
24 trial exists only if "the evidence is such that a reasonable jury could
25 return a verdict" for the party opposing summary judgment. *Id.* at 248.
26 In other words, issues of fact are not material and do not preclude
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1 summary judgment unless they "might affect the outcome of the suit under
2 the governing law." *Id.* There is no genuine issue for trial if the
3 evidence favoring the non-movant is "merely colorable" or "not
4 significantly probative." *Id.* at 249.

5 If the party requesting summary judgment demonstrates the absence
6 of a genuine material fact, the party opposing summary judgment "may not
7 rest upon the mere allegations or denials of his pleading, but . . .
8 must set forth specific facts showing that there is a genuine issue for
9 trial" or judgment may be granted as a matter of law. *Anderson*, 477 U.S.
10 at 248. This requires the party opposing summary judgment to present or
11 identify in the record evidence sufficient to establish the existence of
12 any challenged element that is essential to that party's case and for
13 which that party will bear the burden of proof at trial. *Celotex Corp.*
14 *v. Catrett*, 477 U.S. 317, 322-23 (1986). Failure to contradict the
15 moving party's facts with counter affidavits or other responsive
16 materials may result in the entry of summary judgment if the party
17 requesting summary judgment is otherwise entitled to judgment as a
18 matter of law. *Anderson v. Angelone*, 86 F.3d 932, 934 (9th Cir. 1996).

19 **III. Harassment Claim**

20 Mr. Canton brings this lawsuit under Title VII of the Civil Rights
21 Act of 1964, the equal opportunity employment provision, which can be
22 found at 42 U.S.C. § 2000e.² In order to make out a prima facie race
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24 ² Section 2000e-2(a)(1) provides:

25 It shall be an unlawful employment practice for an employer
26 . . . to discriminate against any individual with respect to
27 his compensation, terms, conditions, or privileges of
employment, because of such individual's race, color,
religion, sex, or national original.

1 harassment claim under Title VII, Mr. Canton must demonstrate (1) he was
2 subjected to verbal or physical conduct because of his race, (2) such
3 conduct was unwelcome, and (3) "the conduct was sufficiently severe or
4 pervasive to alter the conditions of [his] employment and create an
5 abusive work environment." *Manatt v. Bank of Am., NA*, 339 F.3d 792, 799
6 (9th Cir. 2003) (quoting *Kang v. U. Lim Am., Inc.*, 296 F.3d 810, 817
7 (9th Cir. 2002)); *Faragher v. City of Boca Raton*, 524 U.S. 775, 786-88
8 (1998). Mr. Canton bases his Title VII harassment claim on five
9 instances of workplace behavior: (1) co-worker Kevin Harmon calling him
10 "boy" in December 2004, (2) co-worker Justin Mulvey calling him "boy" in
11 January 6, 2005, (3) supervisor Clive Luiten using the phrase "boy", (4)
12 supervisor Richard "Monte" Hall calling him "nigger" on March 4, 2005,
13 and (5) Mr. Hall causing a door to hit the back of the chair in which
14 Mr. Canton was seated on March 15, 2005. Assuming these events did
15 occur and were racially motivated, the Court finds these facts
16 individually and collectively do not rise to the level of racial
17 harassment.

18 Although the "boy" and "nigger" comments directed at Mr. Canton
19 were offensive and unwelcome, the Court concludes the conduct alleged in
20 the instant case falls short of conduct that is severe or pervasive
21 enough to create an abusive work environment. In order for racial slurs
22 to constitute an abusive work environment, they must be pervasive and
23 occur more than sporadically. *Bolden v. PRC Inc.* 43 F.3d 545 (10th Cir.
24 1995) (citing *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1412-13 (10th
25 Cir. 1987)). Far more offensive conduct than the conduct alleged in
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1 this case has been held not to create an abusive work environment. See
2 *Vasquez v. County of Los Angeles*, 307 F.3d 884, 893 (9th Cir. 2002);
3 *Kortan v. Cal. Youth Auth.*, 217 F.3d 1104, 1107-11 (9th Cir. 2000)
4 (finding where a supervisor referred to women as "bitches" and
5 "histrionics" and referring to a specific female as a "madonna,"
6 "regina," and a "castrating bitch," plaintiff had not demonstrated an
7 abusive work environment); see also *Bolden v. PRC Inc.*, 43 F.3d 545
8 (10th Cir. 1995) (referring to plaintiff as a "nigger" and "honkey" and
9 warning him that the speaker knew someone in the Ku Klux Klan was not
10 sufficiently pervasive to be actionable); *McCray v. DPC Indus., Inc.*,
11 942 F. Supp. 288, 293 (E.D. Tex. 1996) (subjecting plaintiff to name
12 calling such as "black yankee," "nigger," and "son" and insulting black
13 political leaders four to six times during the year did not create a
14 hostile work environment); *Haskins v. Owens-Corning Fiberglas Corp.*, 811
15 F. Supp. 534, 538 (D. Or. 1992) (being called a "nigger" by a coworker
16 approximately every four days was insufficient to rise to the level of
17 pervasive workplace harassment). Furthermore, after each of these
18 incidents, UPS managers investigated each of the incidents and
19 disciplined employees when it was determined that inappropriate conduct
20 occurred. See *McCray*, 942 F. Supp at 294. Therefore, Mr. Canton's
21 claim of harassment under Title VII fails. Accordingly, UPS's Motion
22 for Summary Judgment with respect to Mr. Canton's Title VII racial
23 harassment claim is granted.

24 VI. Retaliation Claim

25 UPS also asks the Court to grant summary judgment in its favor on
26 Mr. Canton's retaliation claim. Mr. Canton claims UPS moved the
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1 location of his loading site in retaliation for his filing of a
2 discrimination complaint. To establish a prima facie case of
3 retaliation under Title VII, Mr. Canton must demonstrate (1) he engaged
4 in activity protected under Title VII, (2) his employer subjected him to
5 an adverse employment action, and (3) the employer's action was causally
6 linked to the protected activity. See *Stegall v. Citadel Broadcasting*
7 *Co.*, 350 F.3d 1061, 1065-66 (9th Cir. 2003); *Jurado v. Eleven-Fifty*
8 *Corp.*, 813 F.2d 1406, 1411 (9th Cir. 1987). For purposes of this
9 motion, UPS does not contest that Mr. Canton engaged in protected
10 activity; but rather UPS contends Mr. Canton has not suffered an adverse
11 employment action that is linked to his complaints of race
12 discrimination.

13 The Court concludes Mr. Canton was not subjected to an adverse
14 employment action and, even assuming Mr. Canton is able to establish a
15 prima facie case of retaliation, he failed to provide sufficient
16 evidence that the legitimate business reasons offered by UPS for the
17 relocation of his package car were pretextual. See *Texas Dep't of Cmty.*
18 *Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Coleman v. Quaker Oats*
19 *Co.*, 232 F.3d 1271, 1282 (9th Cir. 2000); see also *St. Mary's Honor*
20 *Center v. Hicks*, 509 U.S. 502, 506 (1993) (discussing burden shifting).

21 "[N]ot every employment decision amounts to an adverse employment
22 action." *Brooks v. City of San Mateo*, 299 F.3d 917, 928 (9th Cir. 2000)
23 (citations and internal quotations omitted); *Burlington N. & Santa Fe Ry*
24 *Co. v. White*, 125 S. Ct. 2405, 2415 (2006). An adverse employment
25 action includes "tangible employment action that constitutes a
26 significant change in employment status, such as hiring, firing, failing
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1 to promote, reassignment with significantly different responsibilities,
2 or a decision causing a significant change in benefits." *Burlington*
3 *Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). The Court concludes the
4 transfer of Mr. Canton's package car to a different location within
5 Spokane for loading is not an adverse employment action. A delivery
6 driver spends a negligible part of his day at the loading location;
7 accordingly, the Court finds the change in Mr. Canton's loading location
8 did not constitute a significant change in employment status, especially
9 since it did not impact pay, benefits, or level of responsibility. See
10 *Watts v. Kroger Co.*, 170 F.3d 505, 510 (5th Cir. 1999). For similar
11 reasons, the Court concludes the March 2005 meeting at which Mr. Hall
12 caused the door to strike the back of Plaintiff's chair is not an
13 adverse employment action.³

14 In addition, even if Mr. Canton had been able to make a prima facie
15 showing of retaliation, the Court finds Mr. Canton failed to establish
16 that UPS's legitimate nondiscriminatory business reason for changing the
17 loading location of Plaintiff's package car was pretextual. See *Manatt*,
18 399 F.3d at 801. UPS must be able to respond to the need to balance the
19 workload between its drivers; shifting the loading location of package
20 cars assists in this legitimate business endeavor.

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24 ³ In his response to the motion for summary judgment, Plaintiff
25 identified an event that occurred during 2006 that caused him to
26 receive a written warning. Plaintiff also notes two other incidents
27 with supervisors that were confrontational. Although UPS submits that
the Court should not consider these events because they were not
disclosed by Plaintiff during discovery, the Court concludes, even
accepting these events as true, they do not constitute retaliation.

1 Accordingly, for the reasons given above, **IT IS HEREBY ORDERED:**

2 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 52**) is
3 **GRANTED.**

4 2. **Judgment** is to be entered in favor of Defendant with
5 prejudice.

6 3. This file is to be **CLOSED.**

7 **IT IS SO ORDERED.** The District Court Executive is directed to
8 enter this Order, provide copies to counsel, and **mail copies to the**
9 **Plaintiff.**

10 **DATED** this 9th day of May 2007.

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12 S/ Edward F. Shea
13 EDWARD F. SHEA
UNITED STATES DISTRICT JUDGE

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